In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1149

LOUIS H. MOONEYHAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. A–1) is reported at 47 T.C. 693. The opinion of the court of appeals (Pet. A–25) is reported at 404 F. 2d 522.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1968. The order of the court of appeals denying rehearing was entered on January 8, 1969 (Pet. A–35). The petition for a writ of certiorari was filed on March 12, 1969. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

388-832—69

QUESTION PRESENTED

Whether salary petitioner received while he was employed in Iran was "paid by the United States" within the meaning of Section 911(a)(2) of the Internal Revenue Code of 1954 and, accordingly, subject to federal income tax?

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 911. EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES
>
> (a) *General Rule.*—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle:
>
> * * * * *
>
> (2)[1] *Presence in foreign country for 17 months.*—In the case of an individual citizen of the United States, who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute earned income (as defined in subsection (b)) attributable to such period; * * *
>
> * * * * *

(26 U.S.C. (1958 ed.) 911.)

---

[1] Section 911(a)(2) was amended by Section 11(a) of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960, 1003-1004, but the amendment is not relevant to the issue involved herein.

STATEMENT

Iran borrowed funds from the United States in 1956 to begin a comprehensive program of highway maintenance and construction. (Pet. A–25.) The United States agreed to furnish men, machines and know-how to help Iran carry out its objectives. Iran also borrowed funds from the Export-Import Bank and from the International Bank for Reconstruction and Development which it deposited in a trust fund account in the United States Treasury to reimburse the United States for expenditures incurred in compensating the employees sent to Iran. (Pet. A–26.)

Petitioner, in September 1959, accepted an "indefinite appointment" with the Bureau of Public Roads of the Department of Commerce to work as an equipment specialist in Iran. (Pet. A–25—A–26.) Petitioner was paid by the Bureau of Public Roads of the Department of Commerce with United States Treasury checks. (Pet. A–9.) Petitioner's employment contract was entered into with the Bureau of Public Roads, which had exclusive control over how his work was to be done, his rate of compensation, his tenure of employment, and his promotions. (Pet. A–31.)

In his tax returns for the four years 1959 through 1962 petitioner claimed that the amounts paid for his work in Iran were excludable from gross income under Section 911(a)(2) of the Internal Revenue Code of 1954. The Commissioner of Internal Revenue determined that petitioner was not entitled to the exclusion on the grounds that the amounts were "paid by the United States" within the meaning of the

statutory exception to the Section 911(a)(2) exclusion. The Tax Court ruled for petitioner. The court of appeals reversed.

ARGUMENT

1. The decision of the court of appeals is correct. In general, the Internal Revenue Code exempts from taxation income earned by an American citizen who has worked outside the United States for at least 17 out of 18 consecutive months. Section 911(a)(2), *supra,* p. 2. Excepted from the scope of this exemption are "amounts paid by the United States or any agency thereof." *Ibid.* It is undisputed that petitioner was literally paid by the United States — bi-weekly by Treasury checks sent from the United States. (Pet. 5; A–9.) In addition, petitioner's employment contract was entered into with an agency of the United States Government. If petitioner for any reason was not paid, he would look to the United States Bureau of Public Roads, and not to Iran, for payment. The Bureau had exclusive control over how he worked, how much he was paid, and whether and when he was promoted or dismissed. Plainly he was an employee of and was paid by the United States.

When Congress added the exception to the exclusion, it meant to deny the exclusion to all United States employees working overseas, essentially because they do not compete with other persons in those countries for identical wages and generally are—as was petitioner (Pet. A–7)—exempt from foreign income taxes. It is indeed the double exemption from income taxes which petitioner seeks here that the ex-

ception to Section 911(a)(2) was intended to withdraw.[2] As the court of appeals stated (Pet. A–30—A–31):

> To be entitled to the exclusion, there must be a direct relationship between the individual claiming it and his foreign employer; the absence of such a relationship defeats the claim. As we read its legislative history, the exception to the exclusion logically denies to employees of the United States a tax benefit that was enacted by Congress to help American citizens become foreign employees.

The precise issue before this Court has been passed upon by the Courts of Appeals for the Fifth and District of Columbia Circuits and the Court of Claims.[3] These courts, in accord with the court below, held that the exclusion did not reach the payments in question.[4]

2. There is no conflict between the decision below

---

[2] The legislative history of the other sections of the code petitioner relies upon (Pet. 6) shows that Congress simply intended to place all United States employees (as opposed to United States citizens who are foreign employees) on equal ground. See H. Rep. No. 2319, 81st Cong., 2d Sess. 58; S. Rep. No. 2375, 81st Cong., 2d Sess. 48; and see Reply Brief for the Petitioner in the instant case in the court of appeals, at p. 3.

[3] *United States* v. *Johnson*, 386 F. 2d 824 (C.A. 5); *Commissioner* v. *Wolfe*, 361 F. 2d 62 (C.A.D.C.), certiorari denied, 385 U.S. 838; *Johnson* v. *United States*, 390 F. 2d 715 (Ct. Cl.).

[4] The United States District Court for the Eastern District of Tennessee has held to the contrary. See *Krichbaum* v. *United States*, 138 F. Supp. 515. Contrary to petitioner's contention (Pet. 7) that the Commissioner should be estopped because *Krichbaum* was not appealed, the Commissioner cannot be prevented from correcting a mistake of law. See *Automobile Club* v. *Commissioner*, 353 U.S. 180; cf. *Schuster* v. *Commissioner*, 312 F. 2d 311 (C.A. 9).

and *Erlandson* v. *Commissioner,* 277 F. 2d 70 (C.A. 9) (see Pet. 8). In *Erlandson,* the United States had engaged a company which (*id.* at 71), "as the government's agent 'and not as an independent contractor,' " managed a vessel owned by the United States. The court concluded that when the agent received money from the United States and used it to pay the crew's wages, the United States had actually made the payment through its agent. In the present case there is no principal-agent relationship between the Governments of Iran and the United States. The mere fact that Iran reimbursed the United States for the expenditures in connection with the assistance program did not render the United States the agent of Iran with respect to the original expenditures, and did not make Iran the payor of petitioner's salary, and in no way changed the essential employer-employee relationship between petitioner and the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
LOUIS M. KAUDER,
JOHN S. STEPHAN,
Attorneys.

APRIL 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969